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In the Supreme Court of the United States

OCTOBER TERM, 1970

JOSEPH PARISI, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is not yet reported. The stay order of the district court (Pet. App. B) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on December 3, 1970. The petition for a writ of certiorari was filed on March 1, 1971. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the district court properly stayed this habeas corpus action, to review the Department of the

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Army's denial of petitioner's conscientious objector claim, until a final adjudication of the claim in pending court-martial proceedings.

STATEMENT OF FACTS

The facts are essentially as set forth in the margin of the opinion below (Pet. App. A n. 1). Petitioner was inducted into the Army as a draftee on August 22, 1968, and, on May 22, 1969, made application for discharge as a conscientious objector. He asserted that his Army experiences had led him to the firm conviction that participation in any form of military activity conflicted irreconcilably with his Christian beliefs. Petitioner's initial interviews with the base Chaplain, the base psychiatrist and the special hearing officer, all pursuant to Army Regulation AR 635–20, uniformly terminated in his favor; however, his immediate commanding officer recommended disapproval of the application on the ground that petitioner's beliefs were "based on essentially political, sociological, or philosophical views, or on a merely personal moral code." AR 635–20, para. 3b(3).

In November 1969, the Department of the Army denied petitioner's application on the grounds that (1) his professed beliefs became fixed prior to entering the service, and (2) he was not truly opposed to all war due to his religious beliefs. Petitioner then applied to the Army Board for Correction of Military Records for review of the denial of his discharge. Shortly thereafter, on November 28, 1969, he filed in the United States District Court for the Northern District of California a petition for a writ of habeas corpus

seeking discharge from the Army as a conscientious objector. He also sought a preliminary injunction to prevent his transfer from the jurisdiction of the district court and to prohibit further training preparatory to being transferred to Vietnam.

After a hearing on the request for a preliminary injunction, the district court ordered the Army to refrain from requiring petitioner to participate in activity or training beyond his current noncombatant duties; however, injunctive relief against his transfer outside the district was denied. The court agreed to retain jurisdiction of the case until the Army Board for Correction of Military Records reached its decision.

On December 4, 1969, petitioner appealed that part of the order denying a stay of transfer; at about the same time, he received orders to report, on December 31, 1969, to the Overseas Replacement Station at Oakland, California. This was later changed to the United States Army Personnel Center, Fort Lewis, Washington. Petitioner then sought a stay of deployment outside the court's jurisdiction pending disposition of his appeal. The stay was denied by a three-judge panel of the court of appeals on December 10, 1969, on condition that the Army produce petitioner if the appeal should result in his favor. On December 29, 1969, a similar application for stay was denied by Mr. Justice Douglas. 396 U.S. 1233.

Petitioner reported to his duty station at Fort Lewis, Washington, on December 31, 1969. At that time he requested an opportunity to file a second application for discharge as a conscientious objector

and, as required under AR 635–20, he was given seven days to complete and file such an application. On January 6, 1970, he informed the Personnel Center that he no longer wished to submit the application. He was then booked for transportation overseas, where he was to perform noncombatant duties similar to those which had been assigned to him and which he had performed in this country. He refused, however, to obey a military order to board the plane for Vietnam. As a result, petitioner was charged with violation of Article 90 of the Uniform Code of Military Justice, 10 U.S.C. 890, and was confined to the post stockade pending disposition of the charge against him.

On March 2, 1970, while the court-martial was pending, the Army Board for Correction of Military Records notified petitioner that it had rejected his application for relief from the denial of his conscientious objector claim. The district court, on March 6, 1970, issued an order to the Army to show cause why petitioner's pending writ of habeas corpus should not now issue. On the government's motion, the district court, on March 31, 1970, entered an order staying consideration of petitioner's habeas petition until final judgment in the military courts on the court-martial charges (Pet. App. B).[1] Petitioner took an appeal from that order.

On April 8, 1970, the court-martial convicted petitioner on the charge of refusing to obey a lawful military order; the military judge found that the

[1] At petitioner's request, the district court, on March 17, 1970, dismissed the first interlocutory appeal initiated by petitioner on December 4, 1969.

denial of his conscientious objector claim had not been arbitrary, capricious, unreasonable, or an abuse of discretion; he declined, however, to apply the "basis in fact" standard of review that would be applied on habeas corpus in a district court (Pet. App. A n. 11). Petitioner is presently confined in the United States Army Disciplinary Barracks, Fort Leavenworth, Kansas, serving a sentence of two years at hard labor, with dishonorable discharge. His appeal from the court-martial conviction is now pending before the Court of Military Review.

On December 3, 1970, the court of appeals (Pet. App. A) affirmed the district court's stay order. It is that affirmance which petitioner now seeks to have this Court review.

ARGUMENT

Petitioner seeks to set aside the stay order in this case on the ground that a serviceman should not be required to exhaust military judicial remedies before obtaining habeas corpus review of a military administrative determination denying him conscientious objector status. In the normal course of events, we would agree. As stated in United States Department of Justice Memo. No. 652, issued October 23, 1969 (Appendix, *infra*, p. 10): "If court-martial charges have not been preferred, a serviceman need not commit an offense and exhaust military judicial remedies as a prerequisite to relief by way of habeas corpus proceedings in the District Court." But see *Polsky* v. *Wetherill*, C.A. 10, No. 625–70, decided February 24, 1971.

But this is not such a case. Here, after a denial of his conscientious objector claim by the Adjutant General of the Department of the Army, petitioner elected to initiate an application for review to the Army Board for Correction of Military Records.[2] While he need not have done so as a condition to judicial review,[3] once petitioner chose such a course, the district court could properly defer consideration of his subsequently filed habeas corpus petition pending the outcome of that administrative appeal. Nor does petitioner suggest otherwise (Pet. 11).

Rather, the dispute here centers around the court-martial proceedings, instituted while the administrative appeal was pending, for failure to obey an order to report for noncombatant military service in Vietnam.[4]

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[2] We are advised by the Department of Defense that the Army and Air Force boards will take cognizance of such claims; however, the Navy adheres to the policy of rejecting applications of this nature for want of jurisdiction. See Mem. No. 652, *infra*, p. 11

[3] See Appendix, *infra*, p. 11. *Craycroft* v. *Ferrell*, 397 U.S. 335. Where a serviceman does not seek further review by the Army Board for Correction of Military Records prior to filing his habeas corpus petition, the Department of Justice now follows the Fourth Circuit's decision in *United States ex rel. Brooks* v. *Clifford*, 409 F. 2d 700, 706–707, holding that in such circumstances the proper application of the exhaustion of remedies principle does not mandate that he do so.

[4] This order was separately considered by both courts below and by Mr. Justice Douglas, on petitioner's application for a stay of deployment. In denying the stay, Mr. Justice Douglas noted that, under the district court's protective order, petitioner could not be assigned in Vietnam "to any duties which require materially greater participation in combat activities or combat training than is required in his present duties." He was then assigned to "psychological counselling." *Parisi* v. *Davidson*, 396 U.S. 1233.

Petitioner, relying primarily on *Hammond* v. *Lenfest*, 398 F. 2d 705 (C.A. 2),[5] contends that because his habeas petition was filed prior to commencement of his court-martial, the stay pending a final judgment in the later military judicial proceedings is invalid. But, as noted above (*supra*, p. 6), the petition for habeas corpus was for another reason premature in this case; by the time the Army Board for Correction of Military Records had decided petitioner was not entitled to conscientious objector status, and thus eliminated the prior bar to habeas corpus, "the charges had then already been filed against [petitioner] by the military authorities, the tribunal that was to judge him had already been convened, and the trial itself was imminent" (Pet. App. A, p. 4). Thus, as the court below pointed out (*ibid.*), *Hammond* is inapposite, for here petitioner was not required by the challenged court order "* * * to commit a further military 'crime' in order to provide himself with a forum. He had already done the act alleged to be unlawful."

The instant case is therefore essentially no different from *In re Kelley*, 401 F. 2d 211 (C.A. 5), where the Fifth Circuit, on facts very similar to those presented here, upheld a stay order pending final judgment in court-martial proceedings that had already commenced. Since, here, petitioner's conscientious objector claim was raised as a defense at his court-

[5] In *Hammond*, no military charges were pending, but the government there argued that Hammond was required by the exhaustion principle to submit to military court-martial as a precondition to judicial review. That position has since been abandoned (see *supra* p. 5).

martial[6] and is presently subject to review by the military appellate courts, the courts below properly declined to intervene pending a final determination by the military tribunals.[7] See *Noyd* v. *Bond*, 395 U.S. 683; *Gusik* v. *Schilder*, 340 U.S. 128. Nor is there any cause to assume that petitioner cannot obtain a discharge from the military if he is ultimately found to be a conscientious objector. As noted by the court below (Pet. App. A, n. 13) "[t]he military court's power to issue emergency writs of habeas corpus is well settled. *Noyd* v. *Bond*, 395 U.S. 683, 695 n. 7 (1969); *Levy* v. *Resor*, 17 U.S.C.M.A. 135, 37 C.M.R. 399 (1967)." The results of the military procedures will, of course, be subject to consideration by the district court, which has retained jurisdiction of the case, at the appropriate time.

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[6] As noted by the court below (Pet. App. A, n. 12), "Parisi himself argued at his court-martial that *United States* v. *Noyd*, 18 U.S.C.M.A. 483, 40 C.M.R. 195, 2 S.S.L.R. 3218 (1969), had settled that review of the basis in fact for administrative denial of a conscientious objector discharge was proper on the issue of the lawfulness of the order alleged to have been disobeyed" To be sure, the scope of the review to be given the administrative decision in a court-martial such as petitioner's appears not to have been settled by the Court of Military Appeals. See *United States* v. *Stewart*, 20 U.S.C.M.A. 272, 43 C.M.R. 112. But there can be no doubt that it is subject to further review in the military appellate proceedings.

[7] Petitioner's assertion that he is unfairly subject to incarceration while his case "winds slowly through the military judicial system" is somewhat disingenuous. Here, the delay of almost one year between petitioner's conviction and review by the Military Court of Appeals has been occasioned not by the military, but by petitioner himself, who has made a total of seven requests for "enlargement of time."

CONCLUSION

For the reasons stated, it is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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APRIL 1971.

APPENDIX

UNITED STATES DEPARTMENT OF JUSTICE,
Washington, D.C. 20530, October 23, 1969.

Memo. No. 652

To All United States Attorneys
Re: Habeas Corpus Relief of Servicemen Denied Discharge as Conscientious Objectors

After consultation with the Department of Defense the following policy respecting review of denials of release sought under Department of Defense Directive 1300.6 has been adopted effective immediately:

1. EXHAUSTION OF MILITARY JUDICIAL REMEDIES

If court-martial charges have not been preferred, a serviceman need not commit an offense and exhaust military judicial remedies as a prerequisite to relief by way of habeas corpus proceedings in the District Courts. However, if court-martial charges have been preferred military judicial remedies must be exhausted before resort to the civil courts. The Government acquiesces in the decisions in *In re Kelly*, 401 F. 2d 211 (5th Cir. 1968) and *Hammond* v. *Lenfest*, 398 F. 2d 705 (2d Cir. 1968) and will no longer urge the position taken in *Noyd* v. *McNamara*, 378 F. 2d 538 (10th Cir. 1967).

2. EXHAUSTION OF MILITARY ADMINISTRATIVE REMEDIES

The decision of the Military will be deemed ripe for judicial review upon the final action of the Adjutant General of the Army, the Chief of the Bureau of Naval Personnel, the Adjutant General of the Air Force or the Commandant of the Coast Guard. Application to the Army and Air Force Boards for the Correction of Military Records will remain an available procedure but will not be insisted upon by the Government as a precondition to judicial review. The Board for the Correction of Naval Records adheres to its policy of rejecting applications for want of jurisdiction.

3. The instructions set forth in the United States Attorneys Bulletin, Vol 17, No. 23, pp. 613–14, to the extent that they are inconsistent with the foregoing, are revoked.

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